

TABLE 6**Vertical Integration: Top 25 Programming
Services by Subscribership¹**

| Rank | Programming Network (Top 25) | Number of Subscribers (Millions)** | MSO Ownership Interest in Network |
|-------------|---|---|---|
| 1 | ESPN | 66.8 | None |
| 2 | CNN | 66.6 | TCI, Time Warner, & others with 5% or less |
| 3 | TBS* | 66.5 | TCI, Time Warner, & others with 5% or less |
| 4 | USA Network | 65.8 | Viacom |
| 5 | Discovery | 65.8 | TCI & Cox |
| 6 | TNT | 65.2 | TCI, Time Warner, & others with 5% or less |
| 7 | C-SPAN | 64.3 | 1/ |
| 8 | Nickelodeon/Nick at Nite | 63.6 | Viacom |
| 9 | TNN (The Nashville Network) | 63.4 | None |
| 10 | The Family Channel | 63.2 | TCI |
| 11 | Lifetime | 62.6 | None |
| 12 | Arts & Entertainment | 62.4 | None |
| 13 | MTV | 61.0 | Viacom |
| 14 | The Weather Channel | 58.8 | None |
| 15 | Headline News | 58.6 | TCI, Time Warner, & others with 5% or less |
| 16 | CNBC | 55.2 | None |
| 17 | AMC (American Movie Channel) | 55.0 | Cablevision Systems |
| 18 | QVC | 53.5 | Comcast & TCI |
| 19 | VH-1 | 52.0 | Viacom |
| 20 | BET | 43.2 | TCI & Time Warner |

¹ See Table 5 for ownership percentages

| Rank | Programming Network (Top 25) | Number of Subscribers (Millions)** | MSO Ownership Interest in Network |
|-------------|---|---|--|
| 21 | The Learning Channel (TLC) | 41.1 | TCI & Cox |
| 23 | HSN | 40.9 | TCI |
| 24 | Prevue Channel | 40.8 | None |
| 25 | WGN* | 38.9 | None |

Sources: MSO public filings at the Securities and Exchange Commission; Paul Kagan Assocs., Inc., *Cable Network Ownership*, The Economics of Basic Cable Networks: 1994, Nov. 1994, at 42-43; *Mega Media Top 13*, Broadcasting & Cable, Aug. 7, 1995, at 6-7.

* Although Paul Kagan's analysis of A.C. Nielsen data rate superstations TBS & WGN as cable networks for the purpose of ratings, they are, in actuality, broadcast licensees.

** For services offered on a per channel or per program basis, the number of subscribers are the number of units paying for the individual programming service. For other programming services, the number of subscribers represent the number of cable subscribers to whom the service is available on a programming tier.

1/ Cable affiliates provide 95% of funding but have no ownership or program controlling interests.

TABLE 7

Vertical Integration: Top Fifteen Programming Services By Prime Time Rating

| Rank | Programming Service | MSO with Ownership Interest¹ |
|-------------|-----------------------------|--|
| 1 | USA Network | Viacom |
| 2 | TBS | TCI, Time Warner (others have 5% or less) |
| 3 | TNT | TCI, Time Warner (others have 5% or less) |
| 4 | Lifetime | None |
| 5 | ESPN | None |
| 6 | Cartoon Network | TCI, Time Warner (others have 5% or less) |
| 7 | CNN | TCI, Time Warner (others with 5% or less) |
| 8 | Discovery | TCI, Cox |
| 9 | Arts & Entertainment | None |
| 10 | The Family Channel | TCI |
| 11 | TNN (The Nashville Network) | None |
| 12 | BET | TCI, Time Warner |
| 13 | Sci-Fi Channel | Viacom |
| 14 | The Learning Channel | TCI, Cox |
| 15 | E! Entertainment | Time Warner, TCI, Continental, Comcast, Cox |

Sources: NCTA Comments, June 30, 1995, Appendix E, Table 8; Paul Kagan Assocs., Inc., *Prime-Time Ratings, July 1995*, Cable TV Programming, Aug. 31, 1995, at 10.

¹ See Table 5 for ownership percentages

Comments on Program Access Issues

1. *Expansion of Program Access Rules to Non-Vertically Integrated Programming Providers.* Several satellite packagers support expansion of the program access rules to non-vertically integrated programming providers. Satellite Receivers, Ltd., ("SRL") states that programmers have engaged in price discrimination against HSD systems and submits that the Commission must provide a remedy for violations of the program access rules, such as permitting recovery of unjustified overpayments.¹ Satellite service providers argue in favor of extending the program access rules to non-vertically integrated programming providers as the only way independent HSD distributors will have fair access to all programming.²

2. The MMDS industry also supports expansion of the program access rules to non-vertically integrated programming providers. Wireless Cable Association International, Inc., ("WCAI"), argues in favor of extending the program access rules to non-vertically integrated programming providers because "the power that wired cable exerts over programmers stems not only from vertical integration, but also from its status as the current local distribution monopoly."³ WCAI states that several non-vertically integrated programmers charge wireless cable systems higher rates than similarly situated franchised cable systems, conduct which they argue would be unlawful by vertically-integrated programmers. WCAI includes an attachment to its comments an article by David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, which concludes that the program access rules should apply equally to all program suppliers, because both vertically integrated and non-integrated firms tend to engage in the same pattern of behavior with respect to program pricing and availability.⁴

3. The National Cable Television Association, ("NCTA"), opposes expansion of the program access rules to non-vertically integrated programmers and believes that these rules have already established the ability of MVPDs to compete in the market with cable

¹ SRL Comments at 1-2.

² SRL Comments at 5; *see also* PrimeTime 24 Comments at 5-6.

³ WCAI Comments at 17; *see also* WCAI Reply Comments at 3-6.

⁴ David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Federal Communications Law Journal 511, 514-15 (1994). Waterman argues that Congress focused on the potentially anticompetitive effects of vertical relationships in cable without also considering the horizontal market power that exists at the MSO level, whether affiliated or not. *Id.* at 531.

television.⁵ NCTA calls expanding the program access rules "proposing a solution in search of a problem."⁶ NCTA argues that the 1992 Cable Act's legislative history indicates that Congress only intended to apply the program access rules to vertically integrated cable systems,⁷ that there is no evidence that non-vertically integrated programmers have failed to provide access to MVPDs at reasonable, marketplace rates, and that the Commission and Congress have stressed their preference for marketplace solutions rather than government regulation.⁸

4. However, the National Cable Television Cooperative, Inc., ("NCTC"), a buying cooperative of small cable operators, differs with NCTA, arguing that there is little distinction between the competitive impact of discrimination by vertically and non-vertically integrated program providers. Accordingly, NCTC asserts that several non-vertically integrated video programming providers charge NCTC's small system operators a rate "meaningfully higher" than rates charged to larger MSO's.⁹ The Satellite Broadcasting and Communications Association of American ("SCBA") agrees, arguing that "[t]he unjustified price discrimination by non-vertically integrated programming providers refusing to deal with NCTC remains a serious impediment to small operators [sic] ability to compete."¹⁰

5. Programmers generally oppose extending the program access rules to non-vertically integrated programmers.¹¹ They argue that doing so would needlessly burden independent programmers,¹² that "there is no evidence that non-cable [MVPDs] have been denied access to programming by non-vertically integrated programmers,"¹³ and that the rationale for the program access rules -- limiting the perceived ability of cable operators to

⁵ NCTA Comments at 33-39; NCTA Reply Comments at 11-15.

⁶ NCTA Comments at 35.

⁷ NCTA Comments at 36; NCTA Reply Comments at 12.

⁸ NCTA Comments at 38.

⁹ NCTC Comments at 6. *See also* SCBA Reply Comments at 6-8.

¹⁰ SCBA Reply Comments at 3.

¹¹ Lifetime Television ("Lifetime") Comments at 1; Viacom Comments at 1-2; ESPN Comments at 1-2; Group W Satellite Communications ("GWSC") Comments at 3-5; CNBC, America's Talking and Canal de Noticias ("CNBC") Comments at 7; ESPN Reply Comments at 5-8; Viacom Reply Comments at 2-7.

¹² Lifetime Comments at 6.

¹³ ESPN Comments at 2; *see also* GWSC Comments at 3.

impede competitors by withholding access to programming by programming services they control -- does not apply in this circumstance.¹⁴ ESPN argues that the Commission has no administrative record or legislative history to support an extension of the program access rules to non-vertically integrated programmers.¹⁵ Indeed, ESPN believes that the Commission should look for a way to limit the intrusiveness of the current program access rules and should recommend to Congress that they be "eliminated entirely."¹⁶ HBO, however, argues that while government regulation of program access is unnecessary, as long as such regulation exists, it should apply equally to all program suppliers, regardless of their affiliation with cable operators.¹⁷ HBO does not see a legitimate distinction between vertically integrated and non-vertically integrated programmers.¹⁸ It also believes that "[i]f there continues to be a concern that cable operator-owned programmers could discriminate against non-cable MVPDs, the same logic would compel the application of similar program access rules to the LEC/programmer ownership arrangements."¹⁹

6. *Expansion of the Program Access Rules to Non-Satellite Delivered Programming.* Liberty Cable argues that as the major MSOs cluster their systems and escalate their use of fiber optic network to virtually unlimited transmission capacity, it is no longer necessary to rely upon satellites to deliver video signals. Thus, argues Liberty Cable, "as satellites become an increasingly inefficient means to deliver video signals, the current program access provisions . . . will lose their effectiveness."²⁰ WCAI also supports expansion of the program access rules to non-satellite delivered programming and submits that the Commission should recommend that Congress "extend the program access provisions of the 1992 Cable Act so that they are applicable to not only satellite-distributed programming services, but all programming services regardless of the means of distribution."²¹ In contrast, Time Warner argues against applying the program access rules to non-satellite delivered

¹⁴ Viacom Comments at 3-6; Viacom Reply Comments at 4; *see also* Lifetime Reply Comments at 2-3.

¹⁵ ESPN Comments at 4-7; *see also* Lifetime Reply Comments at 2-3; Viacom Reply Comments at 3-4.

¹⁶ ESPN Reply Comments at 8.

¹⁷ HBO Comments at 23-24; HBO Reply Comments at 5-6.

¹⁸ HBO Comments at 24.

¹⁹ *Id.*

²⁰ Liberty Cable Comments at 12; *see also* Section II.E. *supra* regarding SMATV and private cable.

²¹ WCAI Comments at 18.

programming.²²

7. *Application of the Program Access Rules to Customer-Programmers of LEC Facilities and to Programming Affiliates of LECs.* Commenters raise two concerns about the potential application of the program access rules to LEC activities and affiliates. The first concern is whether the program access regime extends to non-LEC affiliated programmers who provide service over a VDT platform.

8. Two LECs strongly support the application of the program access rules to VDT platforms. Bell Atlantic argues that packagers offering programming over a VDT system should be entitled to the benefit of the program access rules.²³ Bell Atlantic points out that this issue is currently the subject of a pending program access complaint.²⁴ Similarly, GTE urges the Commission to aggressively enforce its existing program access rules in order to protect alternative programming providers.²⁵

9. The second concern is whether the program access regime should apply to programming of LEC affiliates that provide programming over VDT platforms. NYNEX argues that since in its view Title VI does not apply when programming is provided by an affiliate of a common carrier VDT provider, the program access rules, which are part of Title VI, do not apply.²⁶ NYNEX states that when a LEC is a cable operator, the program access rules would apply.²⁷ This issue is the subject of a pending Commission proceeding.²⁸ Viacom specifically opposes extending the program access rules to LECs, arguing among other things that it would discourage LEC investment in programming.²⁹ GTE also opposes expansion of the program access rules to LEC affiliated content providers.³⁰ Comcast Cable

²² TWC Reply Comments at 14-17; *see also* Section II.E. *supra* regarding SMATV and private cable; NCTA Reply Comments at 12-13.

²³ Bell Atlantic Comments at 14-16.

²⁴ *See CAI Wireless Systems Inc. and Connecticut Choice Television, Inc. v. Cablevision Systems Inc. et al.*, File No. CSR 4479-P (filed Feb. 28, 1995).

²⁵ GTE Reply Comments at 5.

²⁶ NYNEX Comments at 10-11.

²⁷ *Id.* at 11.

²⁸ *Fourth Notice of Proposed Rulemaking*, 10 FCC Rcd 4617 (1995).

²⁹ Viacom Comments at 5; *see also* Lifetime Reply Comments at 4-5.

³⁰ GTE Reply Comments at 4-6.

Communications ("Comcast") argues to the contrary, that when LECs provide video programming, they should not be relieved of the rules that apply to cable operators and that "there is no basis for requiring cable operators, pursuant to the program access rules, to make their program services available to telco distributors of video programming while allowing the telcos to deny their own programming to competing cable operators."³¹

³¹ Comcast Reply Comments at 13-14.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming [CS Docket No. 95-61]

In accordance with its obligation pursuant to Section 628(g) of the Communications Act of 1934, as amended,¹ the Commission has adopted its annual report on the status of competition in the market for the delivery of video programming ("Competition Report"). Numerous conclusions are reached in the Competition Report regarding the extent of competition among multichannel video programming distributors (MVPDs) and the status of competition in the multichannel video programming marketplace. While I agree that cable television operators remain significant players in this arena, I believe that the level of competition has, in fact, increased such that reevaluation of the effective competition standard set forth in the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")² may be warranted in order to truly assess the need for the implementation of rate regulation.

In this Report, the Commission, among other things, evaluates the growth of MVPDs since the submission of its 1994 Competition Report to Congress. Direct Broadcast Satellite subscribership has increased from 600,000 households in 1994 to 1.7 million households in 1995. Moreover, local exchange carriers have entered the MVPD market by way of video dialtone, multichannel multipoint distribution service (MMDS) and cable television facilities. Yet, the reaction by the cable industry to the ensuing competition, as well as the benefits to subscribers must not be ignored.

The Report cites examples of the cable operators' responses to competition from MVPDs. For instance, Cox Communications, Inc. recently announced that it will offer free basic cable service in Omaha, Nebraska, where a video dialtone market trial was initiated by U.S. West.³ Jones Intercable, Inc. has begun connecting its subscribers to an upgrade system not only to offer increased programming options, but also to expand its service offerings to include telephony and

¹ Communications Act of 1934, as amended § 628(g), 47 U.S.C. § 548(g).

² 47 U.S.C. § 543(l)(1).

³ "Cox Offered Free Service Cable Tier to Omaha Customers as US West Looms", Comm. Daily, Aug. 30, 1995, at 1.

Internet access.⁴ Moreover, in recent months, the Commission has entered into "social contracts" with cable operators that would not only allow them to resolve outstanding rate complaints, but would give these operators a level of certainty with respect to subscriber rates to upgrade their facilities to accommodate additional service offerings.⁵ Even the Commission has recognized that the initiation of permanent commercial video dialtone service in a local market may justify the waiver of certain rate regulation rules for the cable programming service tiers.⁶

The effective competition standard was adopted at a time when there were fewer MVPDs in the marketplace. Though cable television remains a dominant player in certain markets, the proliferation of other MVPDs, on both national and local levels, has created a different competitive environment which, I would argue, may not be accurately reflected by the current regulatory framework. To that end, I am encouraged by the Commission's acknowledgement that robust market-based competition by MVPDs, and not the reliance on rate regulation based on the inflexible definition of effective competition under the Cable Act of 1992, may be the more appropriate basis for ensuring cable programming service rates that are not unreasonable.

⁴ Information Access Co., "U.S. Cities Turning into Battle Grounds for Telecom Competition: Northern Virginia, Omaha, Nebraska, Subs See Plenty of Video Choices", 3 Interactive Video News No. 2 (1995).

⁵ See Social Contract for Continental Cablevision, FCC 95-335 (released August 3, 1995); see also, Social Contract for Time Warner, FCC 95-478 (released November 30, 1995).

⁶ See Waiver of the Commission's Rules Regulating Rates for Cable Services, FCC 95-455 (Nov. 6, 1995). In this instance, the Commission has inquired whether the introduction of video dialtone service by Bell Atlantic in Dover Township, New Jersey, will ensure that incumbent cable operators' rates for cable programming services will not be unreasonable despite the absence of effective competition as defined by statute.